

Title 38 Decision Paper
Department of Veterans Affairs (VA)

FACTS

The Department of Veterans Affairs (VA) is comprised of three administrations: Veterans Health Administration (VHA); Veterans Benefits Administration (VBA); and the National Cemetery Administration (NCA). (Attachment A). VA is the second largest Federal Department and has a workforce of approximately 351,540 full-time employees. *Id.* At present, the VA employs approximately 108,606 Title 38 personnel appointed under described in 38 U.S.C. § 7401(1).¹ (Attachment B). VHA is America's largest integrated health care system, providing care at 1,255 health care facilities, including 170 medical centers and 1,074 outpatient sites of care of varying complexity (VHA outpatient clinics), serving 9 million enrolled Veterans each year. (Attachment C).

On March 15, 2011, a Master Collective Bargaining Agreement (2011 VA-AFGE Master Agreement) by and between the American Federation of Government Employees/National Veterans Council (Union or AFGE), and the VA was approved, signed, and effectuated. (Attachment D). The 2011 VA-AFGE Master Agreement includes Article 59, *Proficiency*. (Attachment E).

On December 15, 2017, the VA provided notification to the Union to "reopen and renegotiate the 2011 VA-AFGE Master Agreement." (Attachment F).

On May 2, 2019, the VA and AFGE Master Agreement bargaining teams exchanged initial contract proposals in order to negotiate a successor VA-AFGE Master Agreement Successor VA-AFGE Maser Agreement. (Attachment G). In the exchanged proposals for Successor VA-AFGE Master Agreement, the Union included a proposal covering Article 59, *Proficiency*. *Id.*

On September 10, 2019, Richard A. Stone, the Executive in Charge of VHA, submitted a Request for a 38 U.S.C. § 7422(b) determination by the VA Secretary on Article 59 in the 2011 VA-AFGE Master Agreement and the Successor VA-AFGE Master Agreement negotiations. (Attachment H).

¹ The employees described in 38 U.S.C. § 7421(b), Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors, are appointed under 38 U.S.C. § 7401(1).

AUTHORITY

The VA Secretary has the final authority to decide whether a matter or question concerns or arises out of professional conduct or competence (i.e., direct patient care or clinical competence), peer review, or employee compensation within the meaning of 38 U.S.C. § 7422(b).

ISSUE

- (1) Whether Article 59, *Proficiency*, of the 2011 VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence, peer review, and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).
- (2) Whether the Union's contract proposal for Article 59, *Proficiency*, which the Union submitted to VA during the collective bargaining negotiations over a Successor VA-AFGE Master Agreement, is a matter or question concerning or arising out of professional conduct or competence, peer review, and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

DISCUSSION

The Department of Veterans Affairs Labor Relations Improvement Act of 1991, codified in part at 38 U.S.C. § 7422, granted limited collective bargaining rights to Title 38 employees under 38 U.S.C. § 7422(a) and specifically excluded from the collective bargaining process matters or questions concerning or arising out of professional conduct or competence, peer review, or any matter or question concerning or arising from employee compensation, as determined by the Secretary. 38 U.S.C. §§ 7422(b), (d). "Professional conduct or competence" is defined to mean "direct patient care" and "clinical competence." 38 U.S.C. § 7422(c).

Article 59, *Proficiency*, of the 2011 VA-AFGE Master Agreement states:

- A. The Department will involve employees actively in the promotion/evaluation process. Employees will be notified 90 days prior to the due date for proficiency.
- B. Employees will be given 60 days to provide information that will be used in the

proficiency.

- C. When employees meet time-in-grade requirements for promotion to the next grade, the employee will be evaluated for promotion at the next scheduled boarding.
- D. Employees will receive current copies of criteria for promotion and special advancement on initial employment. Employees will receive updated copies of promotion and special advancement criteria when changes are made.
- E. Where employees are not promoted, they will receive an explanation regarding those specific elements in which they are deficient.
- F. Proficiencies will be done timely to prevent delays in the boarding cycle. Employees whose proficiencies have been unduly delayed without good cause will be made whole. (Attachment E).

The Union's May 2, 2019, proposal covering Article 59, *Proficiency*, for the Successor VA AFGE Master Agreement states:

A. The requirements for the Proficiency Rating System are regulations prescribed pursuant to section 7421 of Title 38, U.S. Code. The proficiency rating system is designed to assure the effective and efficient utilization of the covered employees and to furnish bases for assistance and guidance to them in the performance of their assignments and the development of their skills and abilities.

B. The proficiency rating system provides for planned, continuous, and systematic review, analysis and evaluation by all supervisors of the effectiveness of employees in their assignments.

C. The Department will send the Proficiency Report form, or a successor form, to rating officials at least 110 days prior to the due date for occupations that are on the anniversary date of the grade proficiency rating cycle.

D. A- The Department will involve employees actively in the promotion/ evaluation process. Employees will be notified 90 days prior to the due date for proficiency.

E. B. Employees will be given 60 days to provide information that will be used in the proficiency.

F. ~~C.~~ When employees meet time-in-grade requirements for promotion to the next grade, the employee will be evaluated for promotion. ~~at the next scheduled boarding.~~ **EMPLOYEES NOT PROMOTED MAY SPEAK TO THE DECIDING OFFICIAL REGARDING WHAT standards have not been met to qualify for promotion. If employee remains dissatisfied, he/she may file an appeal to the appropriate party as outlined in VHA Handbook XXXX. If the appeal is granted, the employee will be made whole.**

G. ~~D.~~ Employees will receive current copies of criteria for promotion and special advancement on initial employment. Employees will receive updated copies of promotion and special advancement criteria when changes are made.

H. E. Where employees are not promoted, they will receive an explanation regarding those specific elements in which they are deficient.

I. ~~F.~~ Proficiencies will be done timely to prevent delays in the boarding cycle. Employees whose proficiencies have been unduly delayed without good cause will be made whole. (Attachment G).

VA's Proficiency Rating System (PRS) covers the Title 38 employees identified in 38 U.S.C. § 7421(b) (Physicians, Dentists, Podiatrists, Optometrists, Registered Nurses, Physician Assistants, Expanded-duty dental auxiliaries, and Chiropractors) and is used to appraise their performance. (Attachment I, VA Handbook 5013, Part II, ¶ 1). The PRS is "designed to...ensure that dealings with the public are consistent with [VA's] mission to provide the best possible care to our country's veterans." *Id.* at ¶ 6(a). 38 U.S.C. § 7422(b) specifically prohibits collective bargaining over matters that concern or arise out of professional conduct or competence. Proficiency reviews "serve as one of the factors for determining eligibility for promotion to higher grade." *Id.* at ¶ 6(a)(4). To achieve such advancement, an employee has to undergo review by a Professional Standards Board (PSB), which is a peer review body that reviews the medical professional's qualifications for advancement by an examination of their personnel folder, proficiency report or performance appraisals, supervisory evaluations, and other pertinent records. (Attachment J, VA Handbook 5005, Part II, Ch. 3, § C, ¶ 5(b)). The PSB review is the process for promotions referenced in Sections C-F, of Article 59 in the 2011 VA-AFGE Master Agreement and in Sections F-I of the Union's proposal for the Successor VA-AFGE Master Agreement. (Attachment E, Article 59, §§ C ("evaluated for promotion at the next scheduled boarding"); D (employees will receive

copies of promotion and special advancement criteria); E (explanation of denial of a promotion); F (proficiencies will be done timely to prevent delays in the "boarding cycle," employees who have been delayed without due cause will be made whole); Attachment G). PSBs inherently concern professional conduct or competence, peer review, and employee compensation for the reasons set forth below.

Professional Conduct or Competence

38 U.S.C. § 7421(a) states: "Notwithstanding any law, Executive order, or regulation, the Secretary shall prescribe by regulation the hours and conditions of employment and leaves of absence of employees appointed under any provision of this chapter in positions in the Veterans Health Administration listed in subsection (b)." 38 U.S.C. § 7421(a). The Secretary has identified the requirements for appraising the performance of employees described in 38 U.S.C. § 7421(b) in Part II of VA Handbook 5013. (Attachment I, VA Handbook 5013, Part II, ¶ 8(c)). An employee "will be rated on elements which provide for consideration of proficiency and performance in terms of pertinent personal, professional, administrative and supervisory attributes, characteristics, skills, and service to the public as applied to the duties and responsibilities of the assignment." *Id.* at ¶ 8(c)(1). The PRS is used to evaluate both 38 U.S.C. § 7421(b) employees' professional skills and the manner in which they provide clinical care to Veterans. As previously noted in VAMC Manchester, the PRS "is the vehicle for evaluation of a [RN's] professional competence and conduct." (Attachment K, VAMC Manchester (September 9, 1992)).

The Secretary has directly addressed the PRS in previous 38 U.S.C. § 7422 decisions. In VAMC Phoenix, the Secretary determined an RN's proficiency rating cannot be challenged through the negotiated grievance procedure. (Attachment L, VAMC Phoenix (April 2, 2015) (finding an "RN's rating in an annual proficiency report is a matter concerning or arising out of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b) and cannot be challenged through negotiated grievance procedures.") In VAMC Ann Arbor, the VA Secretary also held that a grievance regarding a "proficiency rating" and a related denial of a step increase is excluded from collective bargaining since the matter concerns or arises out of professional conduct or competence. (Attachment M, VAMC Ann Arbor (September 25, 2008)). In VAMC DC, the Secretary again determined that to "the extent that such an [proficiency] assessment involves the provider's performance of direct patient care duties, it necessarily involves issues of direct patient care and clinical competence" and held as previously determined on "several occasions that substantive ratings in proficiency reports involves issues of professional conduct or competence within the meaning of 38 U.S.C. § 7422(b). (Attachment N, VAMC DC (January 6, 2005)).

Article 59 in both the 2011 VA-AFGE Master Agreement and the Union's proposal for the VA-AFGE Successor Master Agreement addresses the PRS and PSB processes, which evaluate 38 U.S.C. § 7421(b) employees' skills and qualifications for advancement. Based on the foregoing, the articles constitute matters concerning or arising out of professional conduct and competence that are excluded from collective bargaining pursuant to 38 U.S.C. § 7422(b).

Peer Review

Article 59 in both the 2011 VA-AFGE Master Agreement and the Union's proposal for the VA-AFGE Successor Master Agreement also addresses 38 U.S.C. § 7421(b) employees' advancement and promotion, which is handled by PSBs as outlined above. (Attachment E) (Attachment G). PSBs conduct peer reviews and those reviews are the mechanism by which 38 U.S.C. § 7421(b) employees, except physicians and dentists, obtain advancement. (Attachment J, VA Handbook 5005, Part II, Ch. 3, § C, ¶¶ 1(a)(1-2) 5(b)). The Secretary has previously found that matters pertaining to PSB procedures are questions related to or arising out of peer reviews. Specifically, the Secretary has determined that PSBs' initial review of applicants and credentialing/clinical performance reviews constitute peer review functions. (Attachment O, (Minneapolis VA Health Care System (Oct. 20, 2014)(PSB's initial boarding decision is a matter or question excluded by § 7422 as a peer review or compensation issue)); (Attachment P, (VAMC Washington, DC (June 3, 2014)("PSBs by, definition, are engaged in peer review," including when conducting credentialing and clinical performance reviews)).

The FLRA has repeatedly upheld VA management's unfettered discretion with respect to PSBs because of their inherent peer review function. The FLRA has ruled that there was no right to union representation during PSB proceedings because the VA "is authorized to prescribe regulations governing, among other things, probationary peer review proceedings for nonhybrid employees without regard to the bargaining and representational rights and obligations...." Dep't of Veterans Affairs Med. Ctr. Jackson, Miss. & Nat'l Fed'n Fed. Employees, 49 F.L.R.A. 171, 175 (Feb. 28, 1994) *reconsideration denied*, 49 F.L.R.A. 701 (Apr. 8, 1994). The D.C. Circuit has also acknowledged VA's exclusive authority over peer review matters. Nat'l Fed'n Fed. Employees, Local 589 v. Fed. Labor Relations Auth., 73 F. 3d 390, 393-394 (D.C. Cir. 1996) ("[W]e agree with the FLRA's view that the Secretary exercises complete discretion over peer review procedures....").

As PSBs are engaged in peer review when assessing 38 U.S.C. § 7421 employees' qualifications, including for advancement, Article 59 in both the 2011 VA-AFGE Master Agreement and the Union's proposal for the Successor VA-AFGE Master Agreement concerns or arises out of peer review under 38 U.S.C. § 7422(b).

Employee Compensation

38 U.S.C. § 7422(b)(3) specifically prohibits collective bargaining over matters that concern or arise out of the establishment, determination, or adjustment of employee compensation. Article 59, both in the 2011 and the Union's proposal for the Successor VA-AFGE Master Agreements, directly relates to the compensation of medical care providers via its provisions regarding the promotion process. (Attachment E)(Attachment G). For example, Article 59 states that if delayed "proficiencies" impact the "boarding cycle," employees "will be made whole," which implies a payment of backpay. (Attachment E, ¶ F). Furthermore, VA Handbook 5013 notes that employees are required to have a proficiency rating of satisfactory in order to receive Periodic or Longevity Step increases. (Attachment I, VA Handbook 5013, Part II, ¶ 12(a)(1)(b)). This language, which addresses the adjustment of 38 U.S.C. § 7421(b) providers' compensation for delayed proficiencies as well as the requirements for adjustments to their pay, concerns or arises out of the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b).

The Secretary has previously determined that matters involving the setting or adjustment of employee compensation is excluded from collective bargaining by 38 U.S.C. § 7422. In VAMC Ann Arbor, the VA Secretary held that a grievance regarding a "proficiency rating" and related denial of a step increase (a type of promotion) is excluded from collective bargaining since the matter concerns or arises out of the establishment, determination or adjustment of employee compensation. (Attachment M, VAMC Ann Arbor (September 25, 2008)). The Secretary has applied this rationale to other PSB actions involving compensation as well, including the initial review of applicants and credentialing/ clinical performance reviews. (Attachment O, (Minneapolis VA Health Care System (October 20, 2014) (a PSB's initial boarding decision is a matter or question excluded by 38 U.S.C. § 7422 as a peer review or compensation issue)). Similarly, the inclusion of language in Article 59 dictating the procedures for employee promotion is improper because promotions can set or adjust compensation, which is outside the scope of collective bargaining for 38 U.S.C. § 7421(b) employees pursuant to 38 U.S.C. § 7422(b)(3).

Based on the foregoing, the subject matters covered by Article 59, *Proficiency*, in both the 2011 and Successor VA-AFGE Master Agreements are inconsistent with the collective bargaining exclusions in 38 U.S.C. § 7422(b) for matters concerning or arising out of professional conduct and competence, peer review, and the establishment determination or adjustment of employee compensation.

RECOMMENDED DECISION

Article 59, *Proficiency*, of the 2011 VA-AFGE Master Agreement concerns or arises out of professional conduct or competence, peer review, and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

RLW

Approved

Disapproved

The Article 59, *Proficiency*, contract proposal submitted by the Union for the Successor VA-AFGE Master Agreement concerns or arises out of professional conduct or competence, peer review, and the establishment, determination, or adjustment of employee compensation within the meaning of 38 U.S.C. § 7422(b) and is thus excluded from collective bargaining and review by any other agency pursuant to 38 U.S.C. § 7422(d).

RLW

Approved

Disapproved

Robert L. Wilkie

Robert L. Wilkie
Secretary of Veterans Affairs

25 OCT 17

Date